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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 756

ALFRED L. SEAVEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 36-40) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered March 17, 1950 (R. 40). The petition for a writ of certiorari was filed April 15, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether, in a prosecution of a witness for perjury in testifying before a grand jury that he had never paid money to a government officer, the two witness rule was satisfied by the testimony of two witnesses, each testifying alone as to a separate instance in which the defendant made such a payment.

2. Whether the testimony of one of the witnesses as to a payment of money by petitioner was sufficiently corroborated by entries she had made in a cash book.

STATUTE INVOLVED

Section 125 of the Criminal Code, 18 U.S.C. (1946 ed.) 231 (now 18 U.S.C. 1621), provided:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years.

STATEMENT

On or about July 25, 1946, a federal grand jury for the Eastern District of Pennsylvania was investigating the activities of Henry J. Kunzig and

the Chemical Cleaning Process Company in connection with the bribery of certain government officials in relation to war contracts. Petitioner, who testified before this grand jury, stated that he did not make any payments on his own behalf or on behalf of Kunzig or anyone else to any officers or employees of the War Shipping Administration, and that he did not make any such payments to Frank Sales. He was later indicted in one count for perjury in so testifying. (R. 3-5.)

At petitioner's trial, the court reporter at the grand jury hearing stated that after petitioner took the oath, he testified that he had been acting general manager in the Philadelphia office of Chemical; that to the best of his knowledge he had never made any payments on behalf of Kunzig, the owner of Chemical, or anyone else to any officers or employees of the War Shipping Administration or to Sales; and that he had neither directed anyone else to make such payments, drawn money from Chemical or Kunzig for that purpose, nor requested Mrs. Azzarano to pay him money to make such payments (R. 5, 6).

Mrs. Azzarano, Kunzig's sister and bookkeeper for Chemical in 1942 and 1943, identified numerous entries in the Government's Exhibit 1, Kunzig's cash book. An entry of August 17, 1942—"commission, Martime Commission, cash $50"—was for a check petitioner told her to make out as a commission. Regarding two entries of August 24,

1942—"commission 37.50" and "Chemical Cleaning Company, commission 37.50"—she testified that petitioner asked her to draw $75 for "commissions." She also testified that the letter "S" in an entry of October 27, 1942—"commissions S. 543.90"—meant Sales, to whom she "was told it was to be turned over," and that she put in the "S" for her own reference because petitioner told her "to draw it for that purpose." (R. 7.) The same was true as to a similar entry of March 5, 1943, on a $200 commission for Sales. An entry of November 10, 1942, reading, "Chemical Cleaning, commission P and S 457.99," referred to a withdrawal for Sales and Pioneer (another company owned by Kunzig) which petitioner told her to make. Petitioner asked her to draw $350 for Sales on April 19, 1943, and this was covered by an entry of that date reading, "Chemical Cleaning, commission, $350." Mrs. Azzarano also testified that she had seen petitioner give $50 to Sales at the Harbor Inn at a Christmas party in December 1944. (R. 8.) She thought this money was the same five ten-dollar bills which she had given to her brother, after which he took them out of his pocket, gave them to petitioner, and remarked that he did not think it was "a nice time to ask for it" (R. 9).

Frank Sales, former assistant local manager of the United States Maritime Commission, testified that in 1944 he went to lunch with petitioner sev-

eral times. At the Edison Hotel in November 1944, according to Sales' testimony, petitioner gave him an envelope containing a "present" which he found to be $125. Sales stated that this was the only time he received money from petitioner. (R. 10.)

The jury found petitioner guilty (R. 29) and he was sentenced to four months' imprisonment (R. 31). The Court of Appeals affirmed the conviction (R. 40).

ARGUMENT

Petitioner contends that the Government's proof did not meet the requirement (see *Weiler* v. *United States,* 323 U.S. 606) that the falsity of a statement made under oath be established by the testimony of two independent witnesses or of one witness and corroborating circumstances. It is asserted that the two witnesses, Sales and Mrs. Azzarano, did not corroborate, but contradicted each other; and that they were accomplices of petitioner and of each other, so that as a matter of law their testimony could not be mutually corroborative. (Pet. 10, 15).

The trial judge, after reviewing the evidence (R. 12-14) and instructing the jury as to the two witness rule (R. 15-16), stated the contrasting positions of the parties (R. 16-17):

> The position that Mr. McBride takes on behalf of the defendant is this. There were two acts of perjury, two payments made which

are the subject matter of this perjury inquiry. One was the fifty dollars, or whatever it may be, that was turned over in the presence of Mrs. Azzarano, and the other amounts which she says were obtained by the defendant for the express purpose of giving them to Mr. Sales, and the other event is the $125 that was paid to Mr. Sales which she [sic] under oath said he obtained.

Mr. McBride's position is, there being two separate events here, two separate payments, that the Government, under the two-witness rule in perjury, is obliged to prove to you by two witnesses, or one witness and corroborating circumstances, each one of those transactions.

* * * * *

The Government constitutes those two acts of alleged payment as being the one offense of paying money to a public officer, and they say that under the two-witness rule they have met the requirements of the law as laid down by the Supreme Court, because they have called Mrs. Azzarano to prove one alleged fact and Mr. Sales to prove another alleged fact, but it is only the one offense of paying money to a public officer. * * * There is only the one count here and it involves what the Government calls the gist or gravamen of the offense of having paid money to a public officer, about which Mr. Seavey is charged with having sworn falsely, and I am sustaining the Government on that point, and I will also affirm their point.

Later, however, after some general instructions (R. 17-18), the judge reiterated in general terms the two witness rule (R. 18-19) and then gave the following instructions requested by defense counsel (R. 19):

> Some one single payment to Sales must be proved either by two witnesses or by one witness and corroborating circumstances. I affirm that point.
>
> Two. Even if you believe Mr. Sales' testimony as to the money he says the defendant gave him after they had lunched together at the Edison Hotel, and even if you believe Mrs. Azzarano's testimony as to the money she says she saw the defendant give Sales at the party at the Harbor Inn, Mr. Sales' testimony and the testimony of Mrs. Azzarano cannot corroborate each other as to the making of any one single payment. I affirm that point.
>
> Three. Nor do Mr. Sales and Mrs. Azzarano constitute two witnesses to any one payment. I affirm that point.

The judge then said that he had given the jury "the two theories of this case" and instructed them to "apply that law to these facts and bring in your verdict accordingly" (R. 19-20).

After the jury had deliberated awhile, they returned with the following question (R. 21):

> Your Honor—One juror would like to know if two witnesses must both agree on one given amount of money paid to Mr. Sales, or if one amount by one witness and another amount by

> another witness would be the two witnesses required for perjury.

The judge replied that this question embodied the real issue of law involved in the case and stated (R. 21-22):

> * * * I answer that question "Yes." That is to say, if you believe that one amount by one witness and another amount by another witness occurred, if you believe that those two amounts were paid in the manner described, that would be the two witnesses required by the law as it is laid down by the Supreme Court in the points for charge that were given to me by the Government, which I affirmed in my general charge.

The judge then adverted to the Government's position that only one act of perjury was involved which it claimed was proved by the testimony of Sales and Mrs. Azzarano, respectively, as to the two separate payments, and to the Government's further contention that Kunzig's cash book contained corroborating evidence (R. 22). In answer to a further question by a juror whether "one witness on this instance and one witness on that would not constitute the two," the judge in his final instructions again adverted to the disagreement between the parties on this issue and reiterated his instruction sustaining the Government's position that such proof satisfied the two witness rule, adding that if there had been separate counts of perjury the rule would require two witnesses or one

witness and corroborating circumstances as to each charge (R. 25-26). Finally, the judge elucidated on the Government's alternative contention "that Mrs. Wilhelmina Azzarano is corroborated by the books that she produces on these various dates in the course of business showing the payments that were made allegedly to give to a Government agent [Sales]," and instructed the jury (R. 26):

> That raises the whole question of fact for you, and if you believe that those payments were made by Mrs. Wilhelmina Azzarano to the defendant and that he gave those moneys to the Government witness, any or all of them, that would be a question for you to decide, and you could find him guilty on that.

The judge concluded with the admonition that the facts were for the jury to decide and asked whether the colloquy had clarified the issues for the jury. The juror who had been asking the questions replied in the affirmative and added, "I wanted it made clear—the two witnesses on a single instance for conviction for perjury" (R. 26-27). It is clear that this last remark was not a statement of a question lingering in the juror's mind, but a statement of the issue which had been troubling him, for it was in the same vein as his original questions and the judge had clarified the point by instructing the jury that in the circumstances of this case testimony by different witnesses as to separate payments would satisfy the two witness rule (see pp. 7-8, *supra*).

Thus, any doubts engendered by the judge's original instructions as to the quantum of proof required in this case were dissipated by his final instructions in response to the jury's questions. The case was finally submitted to the jury on the alternative theories (1) that the testimony of Sales and Mrs. Azzarano as to the respective payments by petitioner to Sales, if believed, was sufficient under the two witness rule, and (2) that Mrs. Azzarano's testimony, together with the entries in the cash book, if believed, was also sufficient. These instructions were not, as petitioner contends (Pet. 8-9), inconsistent with the earlier instructions, given at his request, (1) that the Government was required to prove some one single payment to Sales by two witnesses or one witness and corroborating circumstance, (2) that Sales' and Mrs. Azzarano's testimony was not mutually corroborative, and (3) that these two witnesses were not witnesses to any one payment, except to the extent that they permitted the jury to accept the testimony of both witnesses as to the respective payments as satisfying the two witness rule. We shall show, as petitioner says we must (Pet. 13-14), that both of the alternative theories upon which the case was finally submitted to the jury were legally correct.

1. In respect of the first of the two alternative theories embodied in the trial judge's final instructions, it is important to note that petitioner was

not prosecuted for passing bribes on a number of specific occasions. He was charged in one count with having stated falsely under oath that "he did not make any payments * * * to any officers or employees of the War Shipping Administration * * * [or] to Mr. Frank Sales." (R. 4.) If there had been separate counts, one alleging perjury as to the $125 payment at the Edison Hotel, and another as to the $50 payment at the Harbor Inn, petitioner's argument, as the trial judge recognized (see pp. 6, 8-9, *supra*), might be persuasive.[1] But that clearly is not the situation here.

The instant case, as the Court of Appeals held (R. 38), is governed by its earlier decision in *United States* v. *Palese,* 133 F. 2d 600. Cf. *Commonwealth* v. *Davis,* 92 Ky. 460; *Regina* v. *Hare,* 13 Cox. Crim. Cas. 174. In *Palese* the defendant denied before a grand jury that he had paid any person for voting at an election. Two witnesses, Wheatley and Mrs. Jackson, testified that Palese had paid them. The Court of Appeals recognized that while the testimony of Mrs. Jackson did not corroborate Wheatley's testimony that Palese had paid him, it "did tend, as did Wheatley's, to establish the fact that the defendant did pay persons for voting." 133 F. 2d at 602. In *Palese* the court

[1] It is significant that in the following cases, upon which petitioner strongly relies (Pet. 11), there were multiple rather than one-count perjury indictments: *Regina* v. *Parker,* 1 Car. & Marsh. 639, 174 Eng. Rep. 669; *Williams* v. *Commonwealth,* 91 Pa. 493.

also explicitly rejected the standard for corroborative evidence laid down in *Williams* v. *Commonwealth,* 91 Pa. 493, relied upon by petitioner (see Pet. 11), "namely, that the particular circumstances testified to as indicating falsity must be corroborated and not merely the falsity of the oath itself." 133 F. 2d at 603. The court said: "We think it would be highly undesirable to intensify the rigor of the rule [of evidence in the proof of perjury] by engrafting upon it the strict standard laid down in the *Williams* case as to the nature of the evidence which can be accepted as corroborative." (*id.,* 603-604.)[2]

Just as in the *Palese* case, the government, in the instant case, was required to prove, in conformity with the rule in perjury cases, only the falsity of petitioner's oath, i.e., that his statement that he had never made any payments upon behalf of his employer to a government official was false. The Government did prove by the two witnesses, Mrs. Azzarano and Sales, that petitioner was a perjurer. Even though Mrs. Azzarano's testimony as to the $50 payment to Sales did not specifically

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[2] Petitioner by indirect suggestion seeks to minimize the weight of the *Palese* decision by stating that it was relied upon by the court below in *United States* v. *Weiler,* 143 F. 2d 204, 206, fn. 5, which was reversed by this Court, 323 U. S. 606. The assertion is made "that departures from the special rule in perjury cases are not encouraged." (Pet. 12-13.) *Palese* was merely cited by the Court of Appeals in *Weiler* in connection with an observation that the two-witness perjury rule has been the subject of criticism. *Palese* is entirely consistent with this Court's ruling in *Weiler,* and is not a "departure" from the two witness rule.

corroborate Sales' testimony as to the $125 payment, and vice versa, the testimony of both witnesses did corroborate all that was necessary for conviction, i.e., the falsity of petitioner's statement under oath that he had never made any such payments.[3]

The rule for which petitioner contends would lead to absurd results. For example, if five or any given number of witnesses had testified to receiving payments from petitioner, but none of them had seen money pass to any of the others, under petitioner's theory there would be no corroboration, and therefore no conviction for perjury would be possible. We do not believe such a result should be countenanced.

In this connection, the court below rightly dismissed petitioner's contention (Pet. 15-17) that Mrs. Azzarano and Sales were accomplices of petitioner and of each other and therefore could not, as a matter of law, corroborate each other. As the court said: "They are not 'accomplices' but even if they were it is not to the crime of perjury. There is nothing to this point" (R. 38). There is noth-

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[3] Petitioner argues that the witnesses contradicted each other, because Sales testified that the only money he received from petitioner was at the Edison Hotel, while Mrs. Azzarano testified that she saw Sales receive money from petitioner at Harbor Inn (Pet. 10). However, as the court below pointed out (R. 38), "the jury was not bound to accept or reject Sales' testimony in its entirety; it could believe as true the story of the bribe and reject his testimony that he had received no others," citing *United States* v. *Palese*, 133 F. 2d 600, 603 (C.A. 3), and *United States* v. *Reginelli*, 133 F. 2d 595, 598 (C.A. 3), certiorari denied, 318 U. S. 783.

ing in the record to show that Mrs. Azzarano and Sales were accomplices of petitioner in the crime of perjury; there is no evidence that petitioner committed perjury at their instigation or that they procured the perjured testimony. Cf. *Holmgren* v. *United States,* 156 Fed. 439, 444 (C.A. 9), affirmed, 217 U. S. 509, 523.

2. Mrs. Azzarano testified that she actually saw petitioner give $50 to Sales at the Harbor Inn at a Christmas party in 1944 (R. 8). The court below held that the various book entries made by her as the company bookkeeper, "as they stand, corroborate the direct testimony of payment by the defendant" and "constitute circumstantial corroboration even without [her] explanation" of the entries (R. 39). While the book entries for 1942 and 1943 did not specifically corroborate the fact of the $50 payment which she witnessed at Harbor Inn in 1944 (see Pet. 10), they were, with their references to commissions to the Maritime Commission and to "S", circumstantial corroboration of the fact that other similar payments were made to Sales. The sufficiency of the corroboration was a question for the jury to decide. *Weiler* v. *United States, supra,* 323 U. S. at 610.

In addition, Mrs. Azzarano explained from the book entries which she made what the various "commissions" were (R. 7-8). Petitioner argues that this should not have been permitted, citing *Regina* v. *Boulter,* 5 Cox Crim. Cas. 543, because

it allowed Mrs. Azzarano to corroborate herself. We think the court below correctly distinguished the *Boulter* case on the ground that there the books were not actually in evidence, as in the instant case, but were merely used by the witness to refresh his memory (R. 39).

We see nothing derogatory in the fact that Mrs. Azzarano herself identified the cash book and explained the entries (see Pet. 14). She was the person who made the entries, apparently in the regular course of business, and was thus the person best qualified to explain them. So far as the record shows, there was no objection either to the admission of the book or Mrs. Azzarano's explanation of the entries. Neither did petitioner deny in his testimony that the entries or the symbol "S" referred to payments to Sales. In the circumstances of this case, the book entries constituted in a very real sense independent corroboration of Mrs. Azzarano's testimony as to the $50 payment to Sales.

CONCLUSION

The decision below is correct and there is no conflict of federal decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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